15th Annual Cincinnati Employee Benefits Conference Questions & Answers

Q. Where was the guidance given for waiving IRS late filing penalties when customers file Form 5500's late and submit to DOLs DFVC program?

A. Notice 2002-23, 2002-15 I.R.B. 742 (released March 27, 2002, and published by the tax services the following day).

Q. In light of the "good faith" deadline of end of 2001PY are you advising that even optional EGTRRA provisions be attached to GUST II plans as an "addendum" rather than not adopt such options and take the risk that is a plan sponsor decides to adopt such provisions at a later date the opportunity will be lost?

A. It depends on the effective date the plan sponsor wants to apply to the provision.

Q. If you have a FYE plan (i.e. 6/30) and you execute a prototype plan certification to adopt that plan (i.e. Sunguard Corbel) by the end of fiscal year, do you extend your filing date to December 31, 2002?

A. Yes.

Q. Can you distinguish between what for many years a "temporary" staffing firm versus the newer "PEO" firm for plan purposes? It seems that some "authorities" have expanded the scope of recently issued guidance beyond the IRS intentions by the interpretation that a "temp" is included in PEO guidance.

A. Rev. Proc. 2002-21, 2002-19 I.R.B. 911, was not intented to include agencies that maintain an employer-employee relationship with their employees and who contract out the work of one or more of their employees to a specific entity for a temporary period of time regardless of what the nature of the work being contracted is. Rather, the intent of the revenue procedure is to address the situation where an employer contracts with a firm to handle one or more administrative functions of the employer, e.g., payroll, employee benefits, etc. Rev. Proc. 2002-21 provides that a PEO that maintains a defined contribution plan that benefits workers of its clients (referred to in the revenue procedure as Worksite Employees of Client Organizations) can avoid disqualification for violating the exclusive benefit rule by adopting a multiple employer plan within the meaning of section 413(c) that is a defined contribution plan. In addition, for those PEOs that do not want to adopt a multiple employer plan, Rev. Proc. 2002-21 provides transition rules under which the existing defined contribution plan will be treated as a qualified plan if it is terminated by a date specified in the revenue procedure. Section 1.02 of the revenue procedure states that whether an employment relationship exists depends on the facts and circumstances of each particular case.

Q. An ESOP Publication reported that a TAM was issued last November that permits an ESOP to convert company stock to other investments for terminated participants who do not consent to an immediate distribution. Is this Correct? The publication did not list the TAM Number and I was unable to find it.

A. The conclusion in the TAM applies to that one taxpayer and contains some facts that may be unique to that entity. This particular TAM comes under §6104 and not §6110.

Q. What is the Rev. Proc cite for the IRC 401(a)(9) amendment?

A. Rev. Proc. 2002-29, 2002-24 I.R.B. 1176.

Q. For fewer than 100 employees, IRC section 125 plan, funded by employer assets or insurance only (i.e. "unfunded"), the only reason for filing Form 5500 was 6039D. Was not clear – must these plans still file Form 5500 without Schedule F?

A. Notice 2002-24, 2002-16 I.R.B. 785, did not remove the requirement that a welfare plan must file a Form 5500.

The intent of Notice 2002-24 was to eliminate the filing requirement for cafeteria plans. It does not change the filing requirement for a welfare plan. If your plan covered fewer than one hundred participants and was not required to file as a welfare benefit plan (welfare benefit plans with less than 100 participants which are fully insured, unfunded, or a combination of insured and unfunded, are not required to file a return) then your plan will no longer have a Form 5500 or Schedule F filing requirement.

Plans with over 100 participants which are welfare plans that use a Section 125 feature as their funding arrangement, will still have to file a Form 5500(with the appropriate schedules) for the welfare benefits portion of their plan but will not have to attach a Schedule F. However, if these types of plans had been filing separate Form 5500's for the welfare benefit portion and cafeteria portion of their plan, the Form 5500 with Schedule F will no longer be required for the cafeteria plan but the welfare plan is required to continue to file Form 5500 with the appropriate schedules.

Q. Is a top-heavy minimum mandatory if the plan is safe harbor match or nonelective? Or is it superfluous?

A. For changes to the top-heavy minimum rules, please look at section 613(d) of the Economic Growth and Tax Relief Reconciliation Act of 2001 which added subparagraph (H) to paragraph (4) of section 416(g) of the Code effective for years beginning after December 31, 2001, and the related report of the conference committee at H.R. Rep. No. 84, 107th Cong., 1st Sess. 219, 220.

Q. Catch-up Universal Availability - A US employer sponsors a IRC 401(k) plan with 3000 US Participants and 15 Puerto Rican participants. Recent IRS guidance seems to say that for the plan to satisfy universal availability, the PR employees must be in a separate plan. Is this correct? Is this sufficient to have the separate plan established by 10/01/02?

A. The answer to both questions is yes. See Notice 2002-4, 2002-2 I.R.B. 298, 301.

Q. Rev Proc 2002-29 - Please explain how the model 401(a)(9) amendment can be incorporated into a GUST approved volume submitter plan document at this point and incorporated as part of the GUST submission for all adopting employers. The desire is to avoid having to implement a separate amendment sometime in 2003 to incorporate the 401(a)(9) model amendment.

A. By requesting a new advisory letter in 2002 that incorporates the model amendment into the volume submitter specimen plan. See the last sentence of section 3.05 of Rev. Proc.2002-29, 2002-24 I.R.B.1176, 1178.

Q. In light of the recent Revenue Ruling 2002-42 would no partial termination (no 100% vesting) occur if a MPP converted/merged into:

1. a fixed PSP with a lesser benefit than under the MPP?
2. a discretionary PSS?
3. a 401(k) plan with a fixed or discretionary match?
4. a 401(k) plan (deferrals only) without a matching contribution?

Would a partial termination occur if the MPP was transferred into a separate frozen source in the PSP with the existing vesting schedule but the PS and/or matching source having a greater vesting schedule?

A. By definition a revenue ruling is a conclusion of the Service of how the law is applied to a specific set of facts. Implicit in the above question are facts that vary from Rev. Rul. 2002-42, 2002-28 I.R.B. 76, e.g., coverage and vesting.

Q. I have seen several determination letters that indicate the determination letter cannot be relied upon for CRA prior to submission. How should we handle? These were individually designed plans.

A. The Employer must amend the plan for CRA in accordance with Notice 2001-37 on or before the later of (1) 91 days from the date of the determination letter or (2) end of the normal GUST remedial amendment period applicable to a purely individually designed plan (i.e., not a volume submitter plan modified to become an individually designed plan).

Q. The recent Rev Proc that gives late amenders until Sept 3 to amend and submit (w/sanction) only contemplates ongoing plans (5300 & 5307 submissions). What if late amenders want to terminate the plan? Can it amend, terminate, and submit on Form 5310 and come within the scope of the Rev Proc? Or, was it intentional that Form 5310 submissions were omitted from the Rev Proc?

A. No, it was not intentional that Forms 5310 were omitted; therefore, it is acceptable for a terminating plan to amend and submit on a Form 5310 and fall within the scope of Rev. Procedure 2002-35.

Q. This is to confirm that the Power of Attorney number (assigned by Jennifer) is not the 2848 sent to the service center. Please clarify how this works.

A. Yes this is correct, Jennifer Frederick assigns a unique identifying number to the to the Power of Attorney. Note that this procedure applies only to Forms 5307 & /or 5300 only. Please refer to the article entitled "POA Area Assignments" that is contained in the Spring/Summer 2002 edition of the Employee Plans News. This is available from our web site at www.irs.gov/ep.

Q. For an initial submission of a plan originally adopted many years ago (6 to 10 years ago), must we submit all former plan documents? If not how far back? These are usually prototype adopters.

A. Generally, we will verify TRA'86 by reviewing prior signed and dated plan documents; however, the Service is not precluded from requesting pre-TRA'86 documents if warranted, based on the facts and circumstances of the particular case.

Q. When will model amendment wording be issued for 457 plans for EGTRRA? For new proposed regulations?

A. Notice 2001-57, section III, indicated there would be guidance forthcoming. There were proposed regulations published in the Federal Register on 5-8-02.

Q. Please clarify RAP – For MP/VS plans is the RAP one year from the end of the month in which the last specimen plan letter was received (e.g. PSP advisory letter received 2/21/02; DBP Advisory letter received 4/03/02; Is RAP 4/30/03 to submit all plan types?)

A. Assuming in the example the defined benefit specimen plan was filed timely (i.e., on or before 12-31-00), the remedial amendment period for all plan types is 4-30-03. Please see section 19.05 of Rev. Procedure 2000-20.

Q. Does the RAP end for VS plans the later of

a. 12 months from determination letter date or
b. 12/31/02 or
c. end of fiscal year beginning in 2002 (e.g. 10/31/03)

A. No, the remedial amendment period is as follows, the later of:

1) 12-31-02, or
2) 12 months from the end of the month in which the advisory letter was issued.

This assumes the volume submitter plan(s) were submitted timely (on or before 12-31-00) Please see section VI of Notice 2001-42 for further clarification.

Q. Any truth that the IRS is considering a rolling restatement requirement to even out the volumes of restatements? (i.e. 1/5 of country would have to restate 2005, next 1/5 restate in 2006, etc)

A. It is apparent that you are referring to option G of the White Paper regarding "The Future of the Employee Plans Determination Letter Program". The White Paper may be located on our web site (www.irs.gov/ep). Option G, provides in part that "The length of initial reliance periods would be randomly distributed among plans so that expiration of reliance periods would be spread out over a multi-year period. Thereafter the number of years in each plan's cycle could be the same, but the cycles would end in different years". The Service will be reviewing the comments received from the practitioner community on all of the options contained in the White Paper in the near future.

Q. Handout Typo - Isn't there a typo on page 7, v. (a)(3)(iii) – shouldn't that read amendments for DB plans and not DC plans?

A. Yes, it should read "DB plans".

Q. An M&P Plan that is amended to be individually designed upon GUST restatement will be required to file for a determination letter so that the plan is not a non-amender. Is there a similar requirement for a volume submitter plan that is amended to be an individually designed plan?

A. Yes, for reliance purposes it is no longer word for word and does not meet section II. E. of Announcement 2001-77.

Q. MP and VS plan can rely on sponsor's letter if the adopter makes NO changes to plan as approved (word for word). Does this also apply to NON-standardized prototypes (which usually have more options than standardized prototypes)?

A. Yes, an adopting Employer may rely on the sponsor's letter if all the requirements of sections II. B. and II. C. of Announcement 2001-77 have been satisfied.

Q. If you inherit a plan that was relying on the fact that they adopted another practitioner's VS plan for extended RAP but no certification was signed. They now have switched to a different practitioner. New practitioner submits DL request. New practitioner does not have old practitioner's VS plan approval letter. How do they prove reliance?

A. This situation does present a problem since Section 6.10 of Rev. Procedure 2002-6 specifically requires the submission of the prior plan document including the advisory and or determination letter. Neither the determination letter, nor the plan document, will generally indicate who was the prior sponsor, while the Service would not have knowledge that the employer was under the 1st practitioner's volume submitter plan. This is an example of a case where the reviewer would need to look at the facts and circumstances and supporting evidence submitted to make a determination.

Q. Plan started in 1993 and received a TRA86 determination letter in 1994/5. Is the user fee waived if submitted in 2002 and other rules (e.g. only 1 HCE and less than 100 employees) are met.

A. Based upon the information contained in the parentheses above we are making the assumption that there is at least 1 NHCE who participated in the plan year preceding the plan year in which the determination letter request is being filed and all other rules are met. In this example the user fee would be waived since the request for determination was made within the later of (a) the fifth plan year the plan is in existence or (b) the end of any remedial amendment period with respect to the plan beginning within the first 5 plan years. The fact that the plan received a TRA'86 determination letter in 1994/5 does not eliminate the opportunity to exercise the user fee exemption for the later GUST submission. Please refer to Notice 2002-1 for further detail.

Q. Can you have a prospective termination date (i.e. filed Form 5310 on 3/1/01 and have a termination date of 8/1/01? Are there any limits on termination dates?

A, It is possible to have a prospective termination date; however, the date used must be practical. Termination dates are in a proposed format; however, one has to be cognizant of the fact that a termination may encompass a myriad of issues including, but not limited to, a review of the balance sheet (line 18 of Form 5310), affected participants (line 13 of Form 5310), and proper funding, for plans subject to IRC 412. It is critical that the information provided approximate the expected date of termination in order to have a meaningful review. If we were to assume that the prospective and actual termination dates presented in your example reflect a calendar year plan, barring any other unusual facts and circumstances, it would generally be acceptable; however, if the dates fall into two different plan years there may be a problem.

Q. It was indicated that merged plans need only file one application for determination letter. What if the plan (both a MPP and a PSP) was not timely amended or certified for GUST, but will comply with the September 3 deadline and payment. Can the plan be merged prior to that time (9/3) and only one application (and one fee) be filed?

A. If the merger occurs after the 401(b) period has expired it would necessitate the filing of two applications and two user fees.

Q. Does a MPP merging with a PSP in 2002 have to be updated for EGTRRA before merging?

A. No, the surviving PSP can be amended for the EGTRRA changes that are applicable to both plans. If you do amend the plans for EGTRRA in this fashion, it is important to remember that appropriate amendments must be made to the pre-merger MPPP and PSP. Thus, some of the amendments to the surviving PSP may or may not apply to the MPPP; this distinction would be necessary if different choices or elections were made in the operation of the merged plans prior to the merger.

For example, if the merged MPPP provided for a QJSA (an IRC 411(d)(6) – protected benefit) while the surviving PSP did not, the surviving plan must be amended to preserve this option for benefits accrued under the merged plan. The QJSA provisions of the surviving plan should also apply to the merged plan to the extent necessary to allow the plan to comply with current law prior to its merger into the surviving plan.

Remember that each good-faith EGTRRA amendment must be adopted by the later of: 1) the end of the plan year in which the related EGTRRA provision is first applied in operation, whether optionally or as required by law, or 2) the end of the GUST remedial amendment period for each merging plan. For example, if the GUST remedial amendment period for the MPPP expires May 31, 2003, any good-faith amendments for EGTRRA provisions that became effective in 2002 must be adopted by this date; if the GUST remedial amendment period for this PSP expired on February 28, 2002, the good-faith amendments to this plan must be made during 2002.

Q. The filing a Schedule F is suspended. However, if a plan is over 100 participants or if does not meet the other exceptions, is it still required that a plan file as a welfare benefit plan? We are getting a lot of conflicting answers.

A. Pages three and four of Form 5500 give the exceptions to the ERISA filing requirements. Keep in mind that the "Cafeteria Plan" is the funding vehicle of a welfare plan. Welfare plans that don't meet the exceptions, have to file Form 5500 even though the related cafeteria plan is not required to file. If they meet the exceptions, they are exempt from IRS and DOL filing requirements, and NO return would be filed. Also, Notice 2002-24 suspended the filing requirements for section 6039D (Schedule F). The notice only addresses IRS filing requirements; DOL filing requirements must be researched separately. The notice, which is dated April 5, 2002, is also listed on our web page as well as on the inside cover of the complete 5500 instruction booklets.

Q. Why is the agent reviewing my plan termination asking for amount of contributions and compensation of HCE who received last lump sum distribution?

A. The agent was likely evaluating the possibility of an IRC 415 violation. If the amount of the lump-sum distribution was unusually large in proportion to total plan assets and/or the period of time the HCE had actually participated in the plan (ie: the plan had been effective for only a few years, and the amount disbursed suggests that benefits accrued at a rate in excess of 415 limits), the issue will typically be called into question. Also, if the employer maintains or previously maintained a DB plan, the agent may have been evaluating compliance with 415(e) for plan/limitation years beginning prior to 2000.

Q. Why doesn't a Form 5500-EZ have a place for listing unrealized gains like the Form 5500 does? How does the preparer tie in the account balances to the bottom line of the balance sheet?

A. Lines 10 and 11 of the Form 5500-EZ provide for limited, simplified financial reporting and are not designed to reconcile.

Q. What is the remedial amendment period (RAP) for multiple IRS approval dates? My clients signed a "We want to use your Volume Submitter and/or prototype plan(s) for our GUST restatement" on a timely basis. The IRS approved my Proto DB in December 2001, but I am still awaiting approval (or maybe received it a couple weeks ago but don't know it yet). If an employer eventually adopts my Proto – must he do it by Dec 2002, or can he use the extra time due under my Volume Document Letter Date? (The real problem here is that "The National (document writer) Guys" who did my document approval and filing in my behalf, are late in getting me an appropriate "word processing system" that actually allows me to write documents which were approved some six months ago.)

A. The remedial amendment period will end on the later of:

1) December 31, 2002, or
2) the end of the 12th month following the date of the last letter issued for your prototype <u>or</u> volume submitter plan. If the volume submitter plan was approved after the DB prototype plan, as appears to be the case, the 12-month extension of the RAP would commence on the date of the advisory letter for the plan.

This extension would apply to each client who signed a certification of intent to adopt either plan; pursuant to section 19 of Rev. Proc. 2000-20, a timely certification of intent to adopt a GUST- approved volume submitter or master or prototype plan is deemed to apply to <u>all</u> such plans of the same practitioner that were submitted to IRS for approval on or before December 31, 2000.

For example, if the advisory letter was issued on March 5, 2002, the deadline for each client who signed a certification of intent to adopt your GUST-approved volume submitter or prototype plan would be April 30, 2003. Conversely, if both the DB prototype plan and the volume submitter plan were approved in 2001, the deadline to adopt either plan would be December 31, 2002. Of course, if an employer declines to adopt your GUST-approved plans, the RAP described above will continue to apply to its plan, and the employer must do one of the following <u>before the close of the RAP</u>: 1) adopt another GUST-approved volume submitter or master or prototype plan, or 2) adopt individually-designed amendments that comply with GUST and file a determination letter request for the plan with IRS.

Q. Determination Filings – I have several dozen employer plans who used our firms Standardized and/or Non-standardized documents for (last round of restatements) TRA86. They met the TRA86 REM criteria and their TRA86 plans are "good", but they were never submitted for an IRS determination letter. (You know the ones where we spent 98% of the time on administration Demos (often on a projected basis) and 2% to check to see if " 5.4% + 5.4% excess over 80.1% of SSWB" meets the permitted disparity rules.

When (or if) I file these under the "no cost (or low cost) determination request", will the IRS insist that:

1. Give me a copy of TRA 86 plan.
2. Prove it was signed "on Time"
3. Prove that the TRA 86 REM criteria was "okay", meaning that;
    a. Need to see the DTR document;
    b. Proof that it qualities timely for REM for TDR
    c. Etc, back to 9/4/1975 original ERISA letter?

If this will be the process, why should I file any of these plans? (If it were possible to obtain all of this past 25-year document history, what happens if we find that for an 18-month period, they used an Ins Co Proto Plan that had:

a. Joint a 82% to survivor with 120 payments certain and a cash refund feature including optional levels of low sodium and no caffeine: [yes I am typing what he wrote}
b. and, believe it or not the current PS plan has no annuity option (i.e. was eliminated sometime over the past 25 Years)

Why would I want to subject my clients (or myself) to such an extreme microscopic review?

A. A little too much sugar with the coffee? After the sugar rush (and the caffeine crash), everything has a way of falling into perspective. Hopefully, this answer will help you and other practitioners truly see the light with regard to our policy on prior plan documentation. I (Rick Parker, EP Determinations Quality Assurance Staff /Closing Agreement Coordinator – Cincinnati) definitely have the scoop on this one, as I have developed procedures for verification of prior plan documentation that have been implemented nationwide by EP agents who are working determination cases. In fact, if you want it in writing, Benefitslink.com just published, verbatim, the memorandum that explains our current policy on verification of compliance with prior law and describes the procedural mechanisms used by EP agents to secure prior plan documents or other evidence of plan amendments to comply with certain statutory requirements. See Benefits Buzz, 8/12/2002: Internal IRS Memo Encourages Reviewers Generally Not to Require Pre-TRA 86 Plan Documentation.

In summary, the procedures require an agent to verify full compliance of plan terms with TRA '86, including Code sections 401(a)(17) and (31), in every instance. Our policy of requiring verification of prior plan documents that comply with applicable law is based on the premise that we should make every attempt possible to ensure that the rights of plan participants and their beneficiaries are adequately protected. Such rights are derived entirely from the terms of a legally-binding plan document that has been formally adopted by the employer. The evaluation of full compliance of TRA '86 is essential to this policy, as the benefit rights of millions of current plan participants and beneficiaries are expressed in the form of TRA '86 plan provisions, and we cannot issue a determination letter for a GUST restatement that supersedes a TRA '86 document until we are assured that the plan was amended to fully comply with TRA '86.

Our approach to verification of TDR and ERISA documentation is much less stringent and merely requires an agent to confirm the existence of a plan document with TDR or ERISA provisions that were binding on the employer and plan participants. This reduced scope of review, which is applicable to all pre-TRA

'86 documentation, attempts to balance IRS' efforts to protect participant benefit rights through evaluation of compliance with prior law with the indisputable fact that many comprehensive TDR or ERISA plan documents simply cannot be located. An inquiry into TDR or ERISA should be rare and occur only if 1) uncorrected violations of TDR or ERISA are revealed during an examination or determination case review, and the scope or frequency of such violations strongly suggest that a valid TDR or ERISA document was never adopted or put into effect, or 2) the documentation made available during an examination or submitted with a determination letter application confirms beyond question that the plan was never amended for TDR or ERISA.

So…if you enclose a valid, timely-adopted TRA '86 prototype plan with each determination letter application you file on behalf of your clients, this is sufficient to verify compliance with prior law, and IRS will not address the issue further during its review of the application.

Regarding the IRC 411(d)(6) issue: If the violation of the anti-cutback rules is revealed during our review, we will propose disqualification of the plan unless the issue is resolved through Audit CAP.

Q. IRC 280G – Assume that a change in control provision provides that change in control benefits will be reduced to three-times the base amount (less one dollar) and that this approach produces a larger after-tax benefit than any other approach (other than a full gross-up). If this approach is beneficial to the recipient (I.e., the after-tax benefits is larger than it would be without the cut-back) is the "value" associated with this approach a change in control benefit. Put another way, will the IRS impose an excise tax despite cutback language based on the "value" of avoiding the excise tax?

A. No. It appears that this reduction in payments falls within the three-times base amount limit that Congress intended in order for the Corporation to deduct its payments and for the recipient to avoid the excise tax.

Q. Q&A 15 of the February, 2002 Proposed Regulations states that a director may be a "disqualified individual" if he or she is an independent contractor with respect to the paying corporation and is a highly compensated individual.

Q1. Does this mean that an outside director always is an independent contractor for these purposes (i.e., solely by virtue of his or her directorship) or must there be another relationship (e.g., in addition to being a director, the individual performs management consulting services for the corporation)?

A1. The director, whether an employee or an independent contractor, becomes a disqualified individual if he or she at any time during the disqualified determination period is either an officer, a shareholder, or is highly compensated. Directors who serve no other function with the corporation other than their directorship are disqualified individuals if they are either shareholders or are highly compensated.

Q2. How is an outside director's compensation measured for the HCE element of the test? For example, it is based solely on director's fees plus amounts that the director receives directly for his or her other services? Or, should one look to a test similar to that used in Code 162(m) that focuses on amounts paid directly and indirectly to the outside director?

A2. Compensation is measured under Q&A 21. Indirect compensation is not included.

Q. Please explain how an EGTRRA amendment should be handled with respect to an adopter of a GUST approved volume submitter plan in a request for a determination letter under GUST.

A. You can submit the amendment as part of the GUST determination letter request. Pursuant to section I of Notice 2001-42, pre-approved plans submitted for GUST determination letters may include EGTRRA amendments by using a separate, clearly identified addendum to the plan and/or adoption agreement that is limited to the EGTRRA provisions. We will caveat the letter to reflect the amendment, but the letter will also include another caveat: "This letter may not be relied on with respect to whether the plan satisfies the requirements of section 401(a) of the Code, as amended by (EGTRRA)."

You are undoubtedly wondering why the same determination letter is applicable to the EGTRRA amendments but may not be relied upon if the Service subsequently challenges its qualification. The answer can be found in the final paragraph of section I, which clearly states that, until further notice, determination letters will not consider the EGTRRA changes.

In short, Notice 2001-42 obligates the Service to accept EGTRRA amendments enclosed with a GUST determination letter application; however, a caveat for an EGTRRA amendment merely acknowledges its receipt by the Service, as we are not currently reviewing EGTRRA amendments for compliance with the qualification requirements of IRC 401(a).

Q. In IV (a)(2) of the outline, it states an exception to the rule that an adopter of pre-approved plans has a RAP of 12 months from the date of the approval letter. Can't an employer which had adopted a pre-GUST prototype plan and signed a certification by 2/28/02 adopt a volume submitter plan for GUST and have the 12 month period from the date of the volume submitter approval letter?

A. No, unless the volume submitter and prototype plans are maintained by the same practitioner. If so, you were deemed to have certified your intent to adopt each volume submitter and master or prototype plan of the practitioner when you signed the certification to adopt the prototype, and if the volume submitter plan was approved subsequent to the prototype, the extended GUST RAP would commence on the date of the advisory letter (See Q&A-8 for more details).

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Otherwise, the GUST RAP for your plan will expire at the end on the 12th month following the date of the opinion letter issued for the prototype plan. The date of the opinion letter controls in this instance, as the employer had certified its intent to adopt the GUST-approved prototype by the close of the original GUST RAP. Section 19 of Rev. Proc. 2000-20, which authorizes the extended GUST RAP, allows an employer to adopt a GUST-approved plan of another practitioner within the extended RAP, but the extended RAP remains unchanged. In other words, whatever was in place on 2/28/02 is irrevocable, and the plan will be a late amender for GUST if the employer fails to properly amend the plan for all applicable GUST provisions or submit a determination letter request for a GUST restatement before the expiration of the prototype-based extended RAP.

Q. What are the procedures to be followed to locate lost participants after the IRS is unable to do so? Where should the money go?

A. If the plan is a defined benefit plan that is subject to the termination procedures of Title IV of ERISA, benefits of missing participants are transferred to PBGC, but not until a commercial locator is retained to locate the missing participants and beneficiaries. If irrevocable commitments to provide the benefits to an individual who is eventually located are purchased from an insurance company, no transfer to PBGC is necessary. If a participant cannot be located through the IRS Letter Forwarding Program established under Rev. Proc. 94-22, several other options are available. They include 1) the Social Security Administration Employer Reporting Service, 2) the PBGC Internet Pension Search (www.pbgc.gov/search), and a PBGC booklet explaining the information used to search for lost individuals, “Finding a Lost Pension”. The booklet can be obtained from this website.

Where does the money go if not to PBGC? As Closing Agreement Coordinator for Cincinnati, I have required employers with terminating plans who cannot locate former plan participants for the purpose of remitting to them corrective contributions made on their behalf to deposit the funds into a savings account established in the name and social security number of each participant.

The terms of the closing agreement require an account to be distributed to a participant or beneficiary upon presentation of a valid claim. This approach, or something similar, can be used if the plan is terminating, and a complete disbursement of plan assets is being made. If the plan is ongoing, the vested benefit must remain in the plan indefinitely until the participant or beneficiary is located, unless the benefit is forfeited in accordance with Regs. section 1.411(a)-4(b)(6). This regulation permits the forfeiture of a benefit otherwise payable to a lost participant if such benefit is 1) reinstated by plan provision if a claim is made by a participant or beneficiary, or 2) lost by reason of escheat under applicable state law.